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Nos. 92-482, 92-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

STEPHEN R. STEINBRINK,
ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether national banks may engage in the title insurance agency business outside of the limitations established by Congress in 12 U.S.C. 92, the only statutory enactment to address the permissible scope of insurance agency activities by national banks?

RULE 29.1 LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Respondent American Land Title Association ("ALTA") is a non-governmental corporate body. ALTA is a non-profit corporation founded in 1907. It is organized and existing under the laws of the District of Columbia and is the national association of the land title industry. ALTA has approximately 2,300 members, including title insurance agents and title insurance companies, which do business in all 50 states, including the State of New York. ALTA has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respondent New York State Land Title Association ("NYSLTA") is an unincorporated organization organized in 1921 as the statewide association of the land title industry in the State of New York. NYSLTA has approximately 250 regular members, including title insurance agents and title insurance companies, doing business in New York. NYSLTA has no parent companies, subsidiaries or affiliates that have issued shares to the public.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This brief is submitted by respondents American Land Title Association and New York State Land Title Association (collectively "ALTA") in opposition to the petitions for writ of certiorari filed by the Acting Comptroller of the Currency and the Office of the Comptroller of the Currency (collectively "OCC") in case No. 92-645 and by The Chase Manhattan Bank, N.A. ("Chase") in case No. 92-482. The primary issue raised by the petitions

is whether 12 U.S.C. 92 limits the authority of national banks to engage in the title insurance agency business. The conclusion of the court of appeals that the statute has this effect does not merit review. It raises no conflict with the holding of any other circuit court and is consistent with the language and legislative history of section 92, and with prior judicial precedent.

A. The Genesis of Section 92

In 1863, Congress first established the powers of national banks in legislation that later became known as the National Bank Act. In addition to granting certain express powers, the legislation granted national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24 (Seventh) (1988 & Supp. II 1990) (hereafter "section 24 (Seventh)"). Over the next half century, numerous Supreme Court decisions addressed and delineated those powers that had been granted by Congress in the 1863 legislation and in subsequent amendments.

In February of 1916, the Federal Reserve Board published a memorandum from its counsel regarding the authority of national banks to engage in insurance agency activities. 2 Fed. Res. Bull. 73-74.[1] It concluded that a national bank had no express power to engage in such activities and that no such authority could be derived from the incidental powers provision of section 24 (Seventh). According to the Board, "[a]ny such extension of the powers of national banks must be left to the consideration of Congress." *Id.* at 74, App., *infra*, at 3a.

Four months later, in June 1916, Comptroller of the Currency John Williams wrote to the Congress recommending that it enact legislation, a draft of which was enclosed with the Comptroller's letter, that would grant insurance agency powers to national banks located in

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[1] This memorandum is reproduced at App., *infra*, 1a-3a.

small towns. 53 Cong. Rec. 11,001 (1916).[2] His letter confirmed that, under existing law (specifically referring to the incidental powers provision) and Supreme Court precedent, "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies . . . . It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." App., *infra*, at 6a. In proposing that Congress' grant of insurance agency powers "should be limited to banks in small communities," he reiterated that it would be "unwise and therefore undesirable to confer this privilege generally upon banks in large cities." App., *infra*, at 7a.

After increasing the small town population limit from 3,000 to 5,000, Congress enacted the legislation proposed by the Comptroller. This legislation was codified at 12 U.S.C. 92 (hereafter "section 92"), and remains today the only legislative grant of insurance agency powers to national banks.

B. The *Saxon* and *Heimann* Decisions

Almost fifty years later, in the early 1960's, an advisory committee established by Comptroller of the Currency John Saxon concluded that national banks should have broader insurance agency powers and recommended that Congress enact legislation granting national banks the power to act as insurance agents in connection with their loan transactions. Instead of seeking the necessary legislation, Comptroller Saxon converted the panel's recommendation into an administrative ruling, which purported to determine that national banks already had such authority pursuant to their "incidental" powers. That ruling was struck down by the Fifth Circuit in *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*,

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[2] The full text of the Comptroller's letter, as printed in the Congressional Record, is set out in App. *infra*, at 4a-8a.

399 F.2d 1010 (5th Cir. 1968) ("*Saxon*"), which held that the Comptroller could not expand the insurance agency powers of national banks beyond the express and limited powers Congress had granted in section 92.[3]

In 1980, the D.C. Circuit in *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) ("*Heimann*"), upheld regulations promulgated by the Comptroller to eliminate conflicts of interest in the sale of credit life insurance by national bank directors, officers, and stockholders. These regulations were intended to ensure that the bank itself, and not its principals, received the profits from the near-universal involvement by national banks in selling credit life insurance to their borrowers. The challenge to the regulations involved, in part, whether a national bank could be an agent for the sale of credit life insurance in the face of section 92. Based on the record in that rulemaking, the D.C. Circuit concluded that credit life insurance was so different from other forms of insurance that section 92 and the *Saxon* decision did not constitute a basis for invalidating the Comptroller's conflict of interest regulations. *Id.* at 1170.[4]

[3] Comptroller Saxon's ruling was: "Incidental to the powers vested in them under 12 U.S.C. Sections 24, 84 and 371, National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions." 399 F.2d at 1012. The full text of the ruling and its background is set out in the *Saxon* decision.

[4] Credit life insurance is one type of credit-related insurance that insures the lender of repayment of the outstanding balance due on a loan in the event of the death of the debtor. All forms of credit-related insurance, such as credit disability and involuntary unemployment insurance, basically relate to the terms and conditions under which a borrower's obligation to repay a loan will be deemed satisfied.

C. The OCC's Title Insurance Ruling and the Instant Litigation

In 1986, the OCC issued an interpretive ruling that a national bank may act as agent in the sale of title insurance in any community regardless of population if such activities are undertaken in transactions involving the bank's loans. OCC Staff Interpretive Letter No. 368, *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986), *reprinted in* Chase Pet. App. 33a-44a.[5] The ruling relied extensively on the *Heimann* decision, not only to justify the conclusion that the sale of title insurance was incidental to banking, but also to reject the applicability of section 92 and the *Saxon* decision to title insurance. Chase Pet. App. at 41a-43a. Based on this ruling, in 1989 the OCC approved the establishment by petitioner Chase of two operating subsidiaries with authority to issue owner's and lender's title insurance policies in transactions involving residential and commercial mortgage loans made by Chase and its affiliates. Chase Pet. App. at 30a-32a.

Shortly thereafter ALTA initiated this action to obtain judicial review of the 1986 ruling on title insurance and the 1989 approval of the Chase application. The complaint urged that the OCC's ruling and approval be set aside as unlawful in that they permitted a national bank to engage in title insurance agency activities that are (a) prohibited to them by section 92, and (b) not authorized by section 24 (Seventh) or any other provision of law. After the filing of cross-motions for dismissal and summary judgment, the district court granted the de-

[5] The version of OCC Interpretive Letter No. 368 reprinted in the appendix to the OCC petition at 35a-45a omits eight paragraphs from the letter. These omitted paragraphs, which should have appeared before the carryover paragraph on page 42a of the OCC petition, appear on pages 39a-42a of the appendix to the Chase petition.

fendants' motion to dismiss.[6] The district court found that it was rational for the OCC to conclude that title insurance agency activities were within the incidental powers of national banks, it was not arbitrary and capricious for the OCC to conclude that section 92 was not a limitation on those powers, and the OCC's determination that title insurance differs from the forms of insurance addressed in section 92 was rational. OCC Pet. App. at 29a-30a.

D. The Decision Below

A unanimous panel of the Second Circuit reversed. OCC Pet. App. at 1a-18a; *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992). With regard to the contentions raised by the parties below,[7] the Second Circuit first addressed and rejected ALTA's suggestion that the principles set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), were not applicable to interpretive rulings, such as the OCC's 1986 ruling on title insurance, on which there had been no opportunity for notice and public comment. The court concluded that the principles of *Chevron* were applicable and proceeded to apply them.

The court then focused on the language and legislative history of section 92. It concluded that the legislative history (in particular, the letter from Comptroller Williams) supported its finding that the statutory language precluded national banks from acting as insurance agents outside the provision's geographical restrictions. OCC

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[6] Chase had previously been granted leave to intervene as a defendant.

[7] Before addressing the parties' contentions, the court first concluded that section 92 remains valid law. The court felt compelled to address this issue in light of the decision in *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, 61 U.S.L.W. 3266 (U.S. Sept. 18, 1992) (Nos. 92-484 & 92-507), which was handed down after oral argument in the ALTA case and which had concluded that section 92 was repealed in 1918. OCC Pet. App. at 3a-11a; 968 F.2d at 151-54.

Pet. App. at 12a-15a; 968 F.2d at 155-56. It also found that this analysis of congressional intent was fully consistent with the Fifth Circuit's analysis in *Saxon*. *Id.* at 15a; 968 F.2d at 156.

The court next addressed and rejected the OCC's contentions that *Heimann* and not *Saxon* was the determinative precedent. OCC Pet. App. at 15a-17a; 968 F.2d at 156-57. The court determined that the conclusion in *Heimann* was based on the nature of credit life insurance "rather than on the issue of whether section 92 impliedly operates as a bar to certain national bank activity."[8] The court did not disagree with the *Heimann* court's authorization of credit life insurance activities. Rather, the Second Circuit concluded that *Heimann's* discussion of the applicability of section 92 to credit life insurance was not persuasive on whether section 92 was applicable to a national bank's title insurance agency activities. *Id.* at 17a; 968 F.2d at 157.

Finally, having concluded that section 92 applied to the powers of national banks to engage in title insurance agency activities, the Second Circuit determined there was no need for it to address the scope of the incidental powers provision of section 24 (Seventh).[9] "[E]ven if the general grant of power contained in section 24 (Seventh) were sufficiently broad to encompass the title insurance agency business, so construed the statute would have to yield to the specific limits on insurance activity in section 92." OCC. Pet. App. at 18a; 968 F.2d at 157.

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[8] OCC Pet. App. at 16a; 968 F.2d at 156. The court below also noted that "*Heimann's* persuasiveness is further eroded by its scant analysis of section 92 and its failure to discuss the provision's legislative history." *Id.* at 17a; 968 F.2d at 157.

[9] ALTA had argued that even if section 92 did not preclude the OCC's 1986 determination that national banks had the incidental power to engage in the title insurance agency business, that determination would be contrary to Supreme Court and lower court precedent on the proper scope of the incidental powers of national banks.

REASONS FOR DENYING THE WRITS

The Chase petition seeks review of the decision below on two issues: (1) whether section 92 was repealed in 1918, and (2) the effect of section 92 on the ability of national banks to engage in insurance agency activities, such as title insurance agency activities, that the OCC has determined to be incidental to banking under section 24 (Seventh). The OCC petition seeks review on only the second issue. The decision below does not warrant review on either of these issues.

None of the parties to this case has ever argued that section 92 has been repealed. The Second Circuit considered the point after oral argument only because of the D.C. Circuit decision in *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, 61 U.S.L.W. 3266 (U.S. Sept. 18, 1992) (Nos. 92-484 & 92-507). As the OCC petition recognizes, there is no need for the Court to grant review of the Second Circuit decision in order to address and resolve whether section 92 still exists.

Similarly, there is no need for the Court to grant review on the interpretation of section 92. Petitioners assert that a conflict exists among the circuits on the interpretation of section 92 as a limit on the insurance agency activities of national banks. In fact, there is no conflict. Only two circuits have ever squarely addressed the effect on section 92 on determinations by the Comptroller that national banks can engage in the insurance agency business under their "incidental" powers: the Second Circuit in the decision below and the Fifth Circuit in *Saxon*. Both decisions concluded that, with respect to the insurance agency activities at issue in the respective cases, the Comptroller could not authorize national banks to engage in such activities outside the limitations established by Congress in section 92.

The only appellate court decision cited by petitioners that presents even an apparent conflict with the decision

below is *Heimann*. No real conflict exists, however, between that decision and the *ALTA* and *Saxon* decisions. *Heimann* did not purport to make a definitive interpretation of section 92 in finding that credit life activities were so integral to national bank loan activities as to be permissible. Moreover, the concern expressed by petitioners—that the decision below would jeopardize the long-standing and widespread involvement of national banks in various forms of credit-related insurance—is unfounded. The decision below addressed only whether national banks can engage in the title insurance agency business.

Finally, there is no error in the decision below warranting review. The Second Circuit properly applied relevant principles of statutory interpretation (or, in the case of the OCC's misguided *ejusdem generis* contention, rejected irrelevant principles). In any event, the court's interpretation of section 92 as applying to title insurance has not been shown to be of sufficient moment to merit a separate hearing before this Court.

The petitions in this case should be denied or, if necessary, should be held pending resolution of the petitions in the *IIAA* case. If the Court denies those petitions, or grants review of the D.C. Circuit decision in the *IIAA* case and concludes that section 92 remains enacted law, it should then deny the writs requested here.[10]

I. REVIEW OF THE DECISION BELOW IS NOT NEEDED TO RESOLVE WHETHER SECTION 92 EXISTS

In *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, 61 U.S.L.W. 3266 (U.S. Sept. 18, 1992) (Nos. 92-484 &

[10] If the Court affirms the D.C. Circuit decision, it should grant the petitions here, vacate the decision below, and remand the case back to the Second Circuit for reconsideration in light of the Court's decision in *IIAA*.

92-507) ("*IIAA*"), the D.C. Circuit concluded that section 92, which was enacted in 1916, had been repealed in 1918. This decision was handed down in February 1992, after oral argument had been held before the Second Circuit in the instant case. While the parties below had recognized that section 92 was no longer codified in the U.S. Code, the existence or repeal of section 92 was not an issue in the case. The parties had neither briefed nor argued that issue. Because of the *IIAA* decision, however, the Second Circuit felt compelled to address the repeal issue. The Second Circuit disagreed with the D.C. Circuit and concluded that section 92 was not repealed in 1918. OCC Pet. App. at 3a-11a; 968 F.2d at 151-54.

The Chase petition suggests that review of the decision below is needed in order to resolve a conflict between the two circuits regarding the continued existence of section 92. Chase Pet. at 12. As the Solicitor General has implicitly recognized, this case is not the appropriate vehicle for review of the issue of the existence of section 92. Entertaining the same question in both the *IIAA* case and the instant case would involve duplicative and burdensome argument that would be of little benefit to the Court.

In addition, even if the Court were to determine in the *IIAA* case that section 92 was repealed in 1918, the basis for the decision below in the instant case would still remain. As the Second Circuit recognized, Congress' enactment of the provision demonstrated that section 92 was understood and intended as the sole statutory authority for the insurance agency activities of national banks. The repeal of section 92 would not cast doubt on that conclusion, but would merely suggest that Congress had concluded that even this limited insurance agency authority was inappropriate for national banks.

Indeed, it is not even clear that the instant case would provide a full and adversarial presentation of the issue

of the existence of section 92. The OCC petition contends that it is the *IIAA* decision, not the Second Circuit decision, that is in error on this issue. OCC Pet. at 9. The OCC petition pointedly declines to raise the existence or repeal of section 92 as an issue that justifies this Court's review of the Second Circuit decision. Clearly, the OCC will not argue in this case that section 92 has been repealed. The Chase petition, while asserting a conflict between the Second Circuit and the D.C. Circuit, fails to indicate what position Chase would take regarding whether section 92 exists. Thus, it is possible that, as in the court below, no party in this case will argue that section 92 has been repealed.

In short, there is no reason for the Court to grant review of the decision below in order to address whether section 92 was repealed.

II. THE DECISION BELOW DOES NOT WARRANT REVIEW BY THIS COURT

The Second Circuit's decision on the application of section 92 to the title insurance agency activities of national banks does not raise a conflict among the circuits or any other issue that merits this Court's review.

A. There Is No Conflict Among the Circuits on the Relationship of Section 92 to the Incidental Powers of National Banks Under Section 24 (Seventh)

Only two circuit courts, the Second Circuit in the case below and the Fifth Circuit in *Saxon*, have examined whether section 92 limits the scope of insurance agency activities by national banks other than with respect to the sale of credit-related insurance. Both circuits, after a thorough examination of the language and legislative history of section 92, reached identical conclusions. Other than the *Heimann* decision, the other appellate court decisions cited by petitioners either did not address

section 92 or did so by way of dicta.[11] The lower court decisions cited by petitioners are likewise not in conflict with the Second Circuit's interpretation of section 92.[12]

The petitions seek to create a conflict by contending that the Second Circuit's reading of section 92 is incompatible with *Heimann*. OCC Pet. at 10; Chase Pet. at 16-17. An examination of *Heimann* and the OCC rulemaking at issue in that case makes evident that there is no conflict. The unique factors that led the D.C. Circuit in *Heimann* to conclude that national banks could sell credit life insurance outside the limitations of section 92 are not relevant to title insurance agency activities.

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[11] *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988), did not discuss or even mention section 92.

The footnote in *Independent Ins. Agents of Am., Inc. v. Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984), suggests, without explanation or analysis, that *Saxon* may have been wrongly decided because the legislative history of section 92 indicates that Congress was only concerned with providing small town banks an additional source of profits, not with prohibiting city banks from selling insurance. The court's unsupported statement is clearly in error in light of the Comptroller's 1916 letter to the Congress ("It would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities . . . ."). 53 Cong. Rec. 11,001 (1916); App., *infra*, at 7a.

[12] *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal pending*, No. 92-2010 (5th Cir.), affirmed the OCC's determination that section 92 did not apply to the sale of annuity contracts by national banks because such contracts were "primarily financial instruments, not insurance." *Id.* at 641. That determination, even if upheld on appeal by the Fifth Circuit, would be distinguishable from the *ALTA* and *Saxon* decisions, which involved insurance products.

Sanford v. Garamendi, 284 Cal. Rptr. 897 (Ct. App. 1991), involved provisions of state law, not section 92. While one statutory provision at issue was patterned after section 92 the court's interpretation of that provision was influenced by the legislative history of that state law provision and the existence of another provision of California banking law authorizing state banks to engage in any business activity not prohibited by state law. *Id.* at 903. There is no comparable provision in the National Bank Act.

These factors, discussed immediately below, were addressed at length in ALTA's brief to the Second Circuit. They demonstrate why *Heimann* concluded that credit life insurance was "[u]nlike other forms of insurance." 613 F.2d at 1170. They also demonstrate why the Second Circuit properly concluded that *Heimann* was limited to the credit life context and was not persuasive on whether section 92 was applicable to a national bank's title insurance activities.[13]

First, credit life insurance, unlike title insurance or automobile or homeowners insurance, is a product that exists solely for the protection of credit grantors. Credit life insurance "has no appeal whatsoever to persons not simultaneously borrowing from the bank." Final Rulemaking, 42 Fed. Reg. at 48,518 col. 3. In concluding that *Saxon* did not apply to credit life, the Comptroller noted that other types of insurance were "commonly sought by the public outside the credit granting process." *Id.* at 48,519 col. 1. Although title insurance, like automobile and homeowner's insurance, is customarily required by banks to protect the collateral for their loans, title insurance, unlike credit life insurance, is purchased by owners of real estate and others quite apart from the credit granting process.

Second, credit life insurance would not be available unless credit grantors, such as national banks, sold the

[13] These factors also distinguish credit life insurance from the types of property/casualty insurance at issue in *Saxon*.

The credit life insurance regulations reviewed in *Heimann* are codified at 12 C.F.R. §§ 2.1-2.7 (1992). The rulemaking notices in which these factors were discussed by the Comptroller are *Disposition of Credit Life Insurance Income* (Final Regulation), 42 Fed. Reg. 48,518 (1977) (hereafter "Final Rulemaking"), and *Disposition of Credit Life Insurance Income* (Proposed Rulemaking) 41 Fed. Reg. 29,846 (1976) (hereafter "Proposed Rulemaking").

insurance.[14] It is issued solely to protect the lender and serves the same purpose as "additional collateral, a co-maker or a guarantor." *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 2. In this economic sense, credit life insurance can be viewed as part of the loan repayment terms.

Third, national banks were almost universally involved in the sale of credit life insurance at the time of the OCC's credit life rulemaking.[15] Thus, the OCC rulemaking reviewed in *Heimann* was not authorizing national banks to engage in a new activity. It was merely regulating an activity that was already being engaged in by most national banks. In contrast, national banks were not engaged in the title insurance agency business before the OCC's 1986 ruling on title insurance.

Fourth, unlike the work of a title insurance agent, a bank that sells credit life insurance performs only *de minimis* clerical work. In acting as an agent to enroll borrowers in its credit life insurance program, the bank undertakes little administrative work and essentially none of the investigation and risk evaluation activities that title insurance agents and agents for other lines of in-

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[14] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 2 (credit life insurance is "peculiarly related to the business of banking and not generally available from insurance agencies unaffiliated with financial institutions"); *id.* at col. 3 n.3 ("Congress recognized that creditors are virtually the only source of credit life insurance").

In contrast, title insurance has been and continues to be available from a wide range of independent title insurance agencies, such as the members of respondent associations, and would continue to be readily available in the marketplace if national banks did not engage in the title insurance agency business.

[15] *See* Proposed Rulemaking, 41 Fed. Reg. at 29,847 col. 1 (Comptroller's conclusion influenced by the widespread availability of credit life insurance at commercial banks throughout the United States) and n.1 thereto (survey by national bank examiners of 2,900 national banks indicated that fewer than 20 were *not* providing credit life insurance) (emphasis supplied).

surance perform.[16] Indeed, one could well distinguish *Heimann* on the basis that the role a bank plays in the sale of credit life insurance cannot be considered to be that of an insurance "agent" within the meaning of section 92. At least one district court that has examined the activities of national banks in selling credit life insurance has come to this conclusion. See *First Nat'l Bank v. Smith*, 436 F. Supp. 824, 831-33 (S.D. Tex. 1977), *modified*, 610 F.2d 1258, 1262 (5th Cir. 1980) (discussion of section 92 vacated as unnecessary to resolution of case).[17]

Moreover, a bank that sells credit life insurance performs no activities and exercises no discretion over the scope of policy protection that can give rise to conflicts of

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[16] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 3 (banks engaged in selling credit life insurance do not engage in risk investigation or evaluation or other functions typically performed by an independent insurance agent); *id.* at 48,521 col. 3 ("the administrative cost of producing credit life insurance income is close to negligible"). *See also Commissioner v. First Sec. Bank*, 405 U.S. 394, 397 (1972) ("The cost to each of the Banks for the actual time devoted to explaining and processing the [credit life] insurance was less than $2,000 per year, characterized by the courts below as 'negligible.'").

[17] The *Smith* case, like *Heimann*, involved a challenge to an OCC directive (issued before the OCC's credit life regulations were promulgated) that the bank, rather than its officers, realize any financial benefits to be derived from the sale of credit life insurance. The Fifth Circuit noted that the district court had resolved the purported conflict between section 92 and the OCC's directive "by determining that the handling of credit life by the banks does not constitute the bank or its employees 'agents' as that term is used in section 92." 610 F.2d at 1262.

The appellate court concluded, however, that the district court did not have to decide this issue because the OCC's directive only required the bank to stop the practice of allowing its officers to receive credit life commissions, but did not require the bank itself to become a credit life agent. *Id.* Accordingly, the Fifth Circuit vacated those parts of the lower court opinion that pertained to section 92.

interest. This is not the case when a bank acts as agent in the issuance of title insurance policies insuring its own mortgage loans. A title insurance agent issues policies on behalf of its insurance company after a thorough search and examination of the relevant title-related records and documents. As a title insurance agent issuing policies on its own loans, a bank faces an inherent conflict of interest between its interest as an insured in obtaining the broadest policy coverage and its obligations to minimize the exposure to undue risks of the title insurance company for which it is acting as a policy-issuing agent.

In sum, it is apparent why the Second Circuit concluded that the *Heimann* analysis, while relevant to credit life insurance, did not apply to title insurance.[18] Neither the decision below nor *Saxon* compels the conclusion that *Heimann* was wrong with regard to the credit life activities at issue in *Heimann*. Nor does *Heimann* compel the conclusion that *Saxon* or the decision below was wrong with regard to the property/casualty and title insurance agency activities addressed in those cases. There is no conflict between *Heimann* and the decision below.

B. The Decision Below Raises No Issue of Importance That Merits Review by This Court

The Second Circuit's determination that national banks are precluded from the title insurance agency business outside of small towns raises no issue of overriding importance that merits this Court's review.

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[18] The Bank Holding Company Act, while generally prohibiting bank holding companies from "provid[ing] insurance as a principal, agent, or broker," also recognizes an exception for such credit-related insurance. 12 U.S.C. 1843(c)(8)(A) (1988). See *Heimann*, 613 F.2d at 1170 n.19. In contrast, the Federal Reserve Board has determined that title insurance is encompassed in the Bank Holding Company Act's prohibitions on insurance activities. *See First Wisconsin Corp.*, 75 Fed. Res. Bull. 31, 32 (1989), *aff'd*, *American Land Title Ass'n v. Board of Governors*, 892 F.2d 1059 (D.C. Cir. 1989).

Other than Chase, only a handful of national banks have started title insurance agency operations in reliance on the OCC's 1986 title insurance ruling.[19] Prior to that ruling, there is no evidence that national banks had been engaged in the title insurance agency business.[20] Thus, the determination of the court below will not affect the existing activities of many national banks. If, as the OCC suggests (OCC Pet. at 16-17), it would be desirable for national banks to be able to provide title insurance to their borrowers, such a policy decision should properly be left to Congress.

The petitions exaggerate the scope of the decision below in claiming that the decision "directly threatens" or "calls into question" the ability of national banks to sell credit life insurance and other types of specialized credit-related insurance and products that national banks have long offered to their customers. Chase Pet. at 18; OCC Pet. at 17. The decision below relates only to title insurance. The Second Circuit has not determined that section 92 prohibits national banks from selling credit life insurance

[19] In response to a recent Freedom of Information Act request for information on national banks that have received approval to establish title insurance agency operating subsidiaries, the OCC has indicated that it does not maintain records in a manner that would indicate how many national banks have received approval to engage in particular activities. From information provided in response to previous FOIA requests, ALTA believes that fewer than six other national banks have received approval to establish title insurance agency operations.

[20] The OCC petition states that "many banks provided title insurance directly in 1916," implying that section 92 could not have been intended by Congress to foreclose activities that national banks were engaged in at the time. OCC Pet. at 14 n.5. While *state* banks and trust companies in certain cities were engaged in title insurance activities at that time, there has never been any evidence that *national* banks were engaged in such activities. As the OCC has noted, as a result of the failure of many of these state financial institutions in the Depression, which also resulted in the failure of their affiliated title companies, "[m]ost states now restrict banks from engaging in title insurance." Chase Pet. App. at 36a.

or any of these other types of insurance cited by the petitions.

The petitions raise concerns about a conflict that may never arise. There is no reason to believe that a challenge to the credit life insurance activities approved by the OCC in 1977 and upheld in *Heimann* could be instituted at this late date. This would also be true of the other types of credit-related insurance, such as a credit disability insurance, mortgage life and disability insurance, and involuntary unemployment insurance, that have long been permitted by the OCC.[21] If a future circuit court decision should create a real conflict with *Heimann* by holding that national banks may not sell credit-related insurance outside of the limitations of section 92, this Court can address and resolve such a conflict at that time. Until then, there is no reason for the Court to correct a theoretical conflict that may never arise and is clearly not raised by the holding below.

C. There Is No Error in the Second Circuit's Decision That Warrants Review

The petitions also allege that the Second Circuit's decision merits review because of several alleged errors made by the court in reaching its decision on the interpretation of section 92. OCC Pet. at 11-16; Chase Pet. at 19-24. While the Court does not sit to correct the errors of courts below, in fact the Second Circuit did not err and its decision represents a proper construction of the language and history of the statute.

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[21] *See* Chase Pet. at 15. Similarly, the authority of national banks to sell debt cancellation contracts is not affected by the decision below. Such contracts involve an additional charge to the borrower in return for the bank's obligation to cancel the unpaid balance of the loan in the event of the borrower's death. In this regard, they perform a function similar to credit life insurance. *See First Nat'l Bank v. Taylor*, 907 F.2d 775, 776 (8th Cir.), *cert. denied*, 111 S. Ct. 442 (1990) (upholding OCC authorization for national banks to sell such contracts). Section 92 was not an issue in that case and nothing in the decision below is in conflict with that decision.

First, petitioners suggest that the court ignored the introductory language to section 92 ("In addition to the powers now vested by law in national banking associations . . . ."), which the petitions contend reflects Congress' intent to make clear that section 92 was supplementary to the insurance powers conveyed by section 24 (Seventh). OCC Pet. at 12; Chase Pet. at 19-21. This interpretation of the introductory language to section 92 makes no sense in light of Comptroller Williams' conclusion, expressed in the same letter that recommended enactment of section 92, that no such powers existed under section 24 (Seventh) or any other provision of law. It is absurd to read this language, which was drafted by Comptroller Williams, as reflecting Congress' desire to preserve incidental powers that the Comptroller had told Congress did not exist.[22]

Second, the court below properly applied the interpretive principle of *expressio unius est exclusio alterius* ("expression of one thing is the exclusion of another") to conclude, as did the *Saxon* court, that Congress intended section 92 to prohibit national banks in towns of over 5,000 inhabitants from engaging in the insurance agency business. OCC Pet. at 13; Chase Pet. at 22-23. Application of the principle might be questioned in a case where there were strong indications of contrary legislative intent or where a court simply cited an express, but limited, grant of powers and concluded, from this limited grant alone, that Congress intended to preclude any broader powers. This is not how the court below applied this principle of statutory construction. The court below applied the *expressio unius* principle only after concluding that the legislative history demonstrated that Congress

[22] Indeed, in light of the legislative history, the introductory language is better understood as a "finding" by the Congress that the powers "*now* vested by law in national banking associations" did not include the power to engage in the insurance agency business.

understood that national banks had no other insurance powers.[23]

Third, the OCC petition contends that the court below "overlooked" the maxim of *ejusdem generis* when it concluded that the language of section 92 (which applies to national banks acting as "agent for any fire, life, or other insurance company") applied to title insurance. OCC Pet. at 13-14. The court below did not "overlook" this maxim, since its relevance and application to the language of section 92 was urged upon the court below by the OCC and contested by ALTA. OCC Br. at 20-21; ALTA Reply Br. at 5-7. Rather, the court apparently concluded that the OCC's *ejusdem generis* argument added so little to the OCC's general position that section 92 did not apply to title insurance that the argument did not warrant any separate discussion.

Finally, the petitions contend that the court below failed to give proper deference to the OCC's interpretation of section 92 under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). OCC Pet. at 16; Chase Pet. at 20-22. Deference to an agency interpretation under *Chevron* is only relevant if the court cannot determine congresional intent. If the court is able "to determine congressional intent, using 'traditional tools of statutory construction,'" then "that interpretation

[23] This Court, in construing the powers of national banks, has similarly recognized that a congressional grant of limited powers in a particular area reflects the denial of broader powers in that area. *See, e.g., Texas & Pac. Ry. v. Pottorff*, 291 U.S. 245, 258 (1934) (amendment to National Bank Act granting power to pledge assets to secure deposits of governmental entities "indicates that Congress believed that the original act had not granted general power to pledge assets to secure deposits"); *First Nat'l Bank v. Missouri*, 263 U.S. 640, 657 (1924) (rejecting argument that national banks have the incidental power to establish branch offices in view of express provision that the business of a national bank shall be transacted at "an office or banking house located in the place specified in its organizational certificate").

must be given effect, and the regulations at issue must be fully consistent with it." *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). In this case the court properly determined and applied Congress' intent and had no need to proceed to the second step of *Chevron*.

In sum, the decision below committed no error, and certainly none that merits review by this Court.

D. Reversal of the Decision Below Would Not Resolve This Litigation

Even if the Court were to review and reverse the decision of the court below on the section 92 issue, its judgment would not necessarily resolve this case. There is a second critical issue that the court below concluded it did not have to address: whether the OCC's determination that title insurance agency activities were within the incidental powers of national banks under section 24 (Seventh) was contrary to law or otherwise an abuse of discretion. Even if the court below were wrong in its analysis of section 92, it is highly likely on remand to conclude that, even apart from section 92, the OCC's title insurance ruling was in excess of law.[24] Accordingly, the

[24] An analysis of relevant precedent of this Court demonstrates that section 24 (Seventh) authorizes the entry of national banks into a new line of business only when the new activities are (1) a form of, or functionally equivalent to, deposit taking, credit granting, and credit exchanging activities, or (2) reasonably necessary to enable national banks to perform those activities more effectively or efficiently. *See generally* Symons, *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676 (1983). ALTA's brief to the court below developed this analysis at length. The decisions of courts of appeal on this issue, including the cases chiefly relied on by the OCC in determining that title insurance agency activities were incidental to banking, *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972) and *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), are consistent with this analysis of Supreme Court precedent.

Court's time and effort in resolving the section 92 issue would not resolve this litigation.[25]

CONCLUSION

For all the foregoing reasons, this case is not appropriate for review. Pending a decision in the *IIAA* case, the Court should defer its resolution of the instant petitions. If the Court denies the petition in the *IIAA* case or reverses the D.C. Circuit's judgment in that case, it should deny the petitions for writ of certiorari here. If the Court affirms the judgment in the *IIAA* case, it should remand this case to the court below for reconsideration in light of that opinion.

Respectfully submitted,

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November 12, 1992

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[25] Indeed, the resolution of the section 92 issue would not resolve the questions that may arise in other banking cases on the proper scope of the "incidental to banking" standard—an issue not even reached here by the court of appeals.

APPENDIX

APPENDIX

FEDERAL RESERVE BULLETIN
FEBRUARY 1916
PAGES 73-74

Right of a National Bank to Write Insurance Through Its Officers.

National banks have no express or implied power to write fire, cyclone, liability, or other kinds of insurance, or to receive the profits from insurance contracts entered into by its officers.

JANUARY 13, 1915.

SIR: The question has been raised whether, it is lawful for the officers of a national bank to write fire, cyclone, liability, and other kinds of insurance, all the profits derived from such business being turned into the bank.

The powers of national banks are defined by section 5136, United States Revised Statutes Article VII of which provides:

> To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

The power to write insurance, act as insurance agent or broker, is not specifically enumerated in this section, and unless such business can be considered as incidental to some of the enumerated powers of national banks it is illegal and prohibited by implication as clearly as if

by expression. Logan County National Bank *v.* Townsend, 139 U.S., 67.)

In Farmers & Merchants National Bank *v.* Smith (77 Fed., 129) it was held that it is not within the powers of a national bank to engage in the business of selling mortgage bonds on commission.

Circuit Court Judge Thayer, on page 137, said:

> The brokerage business is entirely distinct from the business of banking which it was authorized to transact. If a national bank can lawfully act as a broker in selling farm mortgages for a commission, no reason is perceived why it may not act in the same capacity in selling any other species of property, real or personal. The national bank act does not, in terms or by necessary implication, authorize national banks to act as brokers in negotiating the sale of securities, and it is generally agreed that they can not lawfully engage in such business.

In Pepperday *v.* Citizens National Bank (183 Pa. St., 519, 524) the Supreme Court of Pennsylvania said:

> It is no part of the business of a national bank to engage in the selling of stocks for anybody. It was a transaction outside of its regular banking business and not within its chartered powers.

In Weckler *v.* First National Bank (42 Md., 581) the court said, on page 593:

> Nor can we perceive it is in anywise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond brokers or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country.

By analogy it would seem that writing insurance on commission is in no sense incidental to any of the enumerated powers of a national bank.

It is contended that the national bank, in the instance under consideration, is not acting as agent for the insurance company, but that its officers write the insurance in their individual capacities and turn in all the profits to the bank.

If the bank receives all the profits of writing the insurance, its officers are, in substance, acting as agents for the bank, and the bank is estopped to deny that it is engaging in the insurance business.

In Schuyler National Bank *v.* Gadsden (191 U.S., 451) it was held that the taking of real-estate security by the president of a national bank in his individual name for the benefit of the bank was in legal effect but the taking of security by the bank itself, and the president acted as its agent.

Where a national bank retains and enjoys the proceeds of a transaction, it is estopped to deny that the act of the officer who enters into the transaction is its own. (Peoples Bank *v.* National Bank, 101 U.S., 181.) National banks, as such, must of necessity act through their officers or other agents.

Inasmuch, therefore, as this class of business does not come within either the expressed or implied powers of national banks, an administrative board or officer can not authorize it. Any such extension of the powers of national banks must be left to the consideration of Congress.

Respectfully,

M. C. ELLIOTT, *Counsel.*

To Hon. C. S. HAMLIN,
Governor Federal Reserve Board.

LETTER FROM COMPTROLLER WILLIAMS

53 CONG. REC. 11,001 (1916)

TREASURY DEPARTMENT,
COMPTROLLER OF THE CURRENCY,
Washington, June 8, 1916.

MY DEAR SENATOR:

The original national-bank act of February 25, 1863, as re-enacted by the act of June 3, 1864, authorizing the formation of national banks throughout the country, provided that no national bank should be authorized with a capital of less than $50,000 in any place; that in a place with a population exceeding 6,000 the capital of the bank should not be less than $100,000, and further provided that no national bank with a capital of less than $200,000 should be organized in any place having a population of over 50,000.

Later on it became manifest that there were many country towns and villages which needed banking facilities but which did not have sufficient business to justify the organization of national banks with a capital of as much as $50,000. To extend the benefits of banking facilities to these small places the national-bank act was amended by the act of March 14, 1900, so as to authorize the organization in towns and villages with a population not exceeding 3,000 of banks with a minimum capital of $25,000.

Since this amendment to the bank act went into effect there have been organized throughout the country 3,084 national banks having a capital of $25,000. Four hundred and thirty-eight of these $25,000 banks have either failed or gone into liquidation, some have increased their capital, and the number of such banks with a capital of $25,000 now in operation is 2,079, or 27 per cent of the total number of national banks.

The average deposits (individual and bank) at this time of all $25,000 banks is $178,138, or 7.13 times their capital and 4.6 times their capital, surplus, and profits. A country bank with $25,000 capital and with the average deposits is able, with good management, to lend its money at rates authorized by law and at the same time to return a reasonable dividend to its shareholders. But there are many banks located in country communities where the small deposits which the banks receive may make it somewhat difficult for the banks to charge on their loans only the rates of interest permitted by law and at the same time yield a satisfactory return to shareholders, and in many such cases banks have been tempted to exact excessive and in some cases grossly usurious rates on accommodations which they extend to local borrowers. It is unfortunately true that in many other cases banks have been demanding usurious rates of interest even though they had more than the average deposits and although adherence to the legal rates would still yield them liberal dividends on their shares.

For some time I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking.

Under Section 5736, United States Revised Statutes, the busines of national banks at this time is limited to the exercise of "such incidental powers as shall be necessary to carry on the business of banking by (a) discounting and negotiating promissory notes, drafts, bills of exchange or other evidences of debt; (b) receiving deposits; (c) buying and selling exchange, coin, and bullion; (d) loaning money on personal security; (e) obtaining, issuing, and circulating notes according to the provisions of this title."

Under the Federal reserve act the banks are further authorized under specified restrictions to make certain loans on real estate.

National banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies or as brokers or agents for others in procuring or making real estate loans.

The courts have uniformly held that such corporations can exercise only those powers which are expressly granted or which are necessarily incidental to powers that are granted.

As stated by Mr. Justice Harlan, in delivering the opinion of the United States Supreme Court in the case of Logan County National Bank v. Townsend (139 U.S., 67):

"It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act for all associations organized under it, and that a national bank can not rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

Again in the case of National Bank v. Matthews (98 U.S., 625), Mr. Justice Swan, in delivering the opinion of the court, said:

"Section 5136 does not in terms prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed."

It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law.

My investigations lead me respectfully to recommend to Congress an amendment to the national-bank act by which national banks located in villages and towns having a

population of not exceeding 3,000 may be permitted to act as agents for insurance companies in the placing of policies of insurance—fire, life, etc.—and that they may also be authorized to act as agents for the negotiation of loans on farms or other real estate in their respective sections of the country, where they may be in position to have some direct knowledge as to the value of the property upon which such loans are to be secured.

It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to make a fair return to their shareholders, while the new business is not likely to assume such whereas as to distract the officers of the bank from the principal business of banking. Furthermore in many small places the amount of insurance policies written or mortgages to be placed on commission is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.

I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. The business is one requiring training, skill, and application, and I think that the profession of banking would suffer if there should be a departure from the principles which should govern and have heretofore governed.

I inclose with this a draft of a proposed amendment to the national-banking act designed to empower national banks located in towns of not over 3,000 population, under such regulations and restrictions as may from time to time be approved and promulgated by the Comptroller

of the Currency, to act as agents for the placing of insurance policies and also to act as agent in making or procuring loans on real estate.

I respectfully recomend and urge the adoption of such an amendment for the reasons I have given.

I am to-day writing a letter similar to this to Congressman Glass, chairman of the Banking and Currency Committee of the House of Representatives.

Respectfully,

JNO. SKELTON WILLIAMS,
Comptroller.

HON. ROBERT L. OWEN,
United States Senate.